

# Making Room in the Property Canon

INTEGRATING SPACES: PROPERTY LAW AND RACE. By Alfred Brophy, Alberto Lopez & Kali Murray. New York, New York: Aspen Publishers, 2011. 368 pages. \$40.00.

Reviewed by Bela August Walker\*

## I. Introduction

Property is oft considered the province of the antediluvian, far situated from modern concerns, particularly issues of race and diversity. Even more so than other areas of legal academia, Property remains the province of dead white men. Courses and casebooks continue to hark back to Blackstone, the epitome of the antiquated.<sup>1</sup> The thread of old English law continues throughout the semester, to the consternation of many a first-year law student. It should come as no surprise that Property is then viewed as lifeless, the course least accessible, least relevant, most obscure. Nonetheless, Blackstone once avowed, “There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property . . . .”<sup>2</sup> This adage may prove still true. If property is dead,<sup>3</sup> long live Property!<sup>4</sup>

*Integrating Spaces: Property Law and Race* takes on one aspect of this potential impasse. Alfred Brophy, Alberto Lopez, and Kali Murray address a long-standing absence and bring the Property casebook into the twenty-first

---

\* Associate Professor, Roger Williams University School of Law. For their sage advice and discerning counsel, I am indebted to M.J. Durkee, Sheila Foster, Jack Greenberg, Tanya Hernandez, Sonia Katyal, Jennifer Flynn Walker, and Patricia Williams.

1. Even *Integrating Spaces* cannot resist beginning its tale with the Englishman’s “‘despotic’ dominion.” ALFRED BROPHY, ALBERTO LOPEZ & KALI MURRAY, *INTEGRATING SPACES: PROPERTY LAW AND RACE* 3 (2011) [hereinafter *INTEGRATING SPACES*].

2. 2 WILLIAM BLACKSTONE, *COMMENTARIES* \*2.

3. See Thomas C. Grey, *The Disintegration of Property*, in *NOMOS XXII: PROPERTY* 69, 74, 81 (J. Roland Pennock & John W. Chapman eds., 1980) (explaining how the evolution of property rights from an idea of ownership to a bundle-of-rights theory has led to property’s decline in importance to legal and political theory). Others have expressed this sentiment, albeit generally in a less succinct manner. Property often literally deals with death, whether discussing dead bodies or dead-hand control. See, e.g., *Symphony Space, Inc. v. Pergola Props., Inc.*, 669 N.E.2d 799, 802–03 (N.Y. 1996) (discussing the issue of dead-hand control in applying the New York rule against perpetuities). Any glance through a Property casebook illustrates how the death of a third party frequently spurs property lawsuits. See, e.g., *JAMES CHARLES SMITH ET AL., PROPERTY: CASES AND MATERIALS* 341–44 (2d ed. 2008) (presenting *Roberts v. Rhodes*, 643 P.2d 116 (Kan. 1982), in which plaintiffs claimed title by deed from the heirs of the original grantors because the land was no longer being used for the purposes set forth in the grant).

4. Forgive me for perhaps misappropriating *Le Roi est mort, vive le Roi!*

century.<sup>5</sup> Their agenda is clear: to take on the fact that “[r]ace is often seen in property law but not heard in the property curriculum.”<sup>6</sup> Neither the concerns nor the cases are new.<sup>7</sup> The final project, however, is innovative and indispensable. While neither flawless nor exhaustive,<sup>8</sup> for the three hundred pages they provide us, the book does an impressive job of answering what it means to think about property and race.<sup>9</sup>

The introduction poses two fundamental questions: “First, why don’t we hear more about the role of race in property law in the first year course? And, second, why aren’t there more cases involving racial minorities . . . in our property casebook?”<sup>10</sup> I have often asked myself these questions and have wondered how to resolve the deficiency. The authors turn the canonical narrative on its head, asking what Property would look like if race were considered at the core of the story instead of a tangential distraction.<sup>11</sup>

*Integrating Spaces* provides a way for both student and professor to unpack the meaning of race in the development of property law and consequently in the legal system and society as a whole. Race has always been present in our study of property, but it normally lurks in the background. This casebook takes age-old concerns and brings them to the forefront; the invisible has been made visible. The case selection challenges notions about the inherent nature of current property distributions by showing how the property system has worked to disadvantage certain groups. A

5. I do not mean to imply that *Integrating Spaces* provides the only answer. There are still many topics of property law that are under-studied and under-taught. Race considerations are but one overlooked topic.

6. INTEGRATING SPACES, *supra* note 1, at xvii.

7. They begin in 1823 with the classic *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823), and trace up to the 2008 *M&T Mortgage Corp. v. Foy*, 858 N.Y.S.2d 567 (N.Y. Sup. Ct. 2008). INTEGRATING SPACES, *supra* note 1, at 16–22, 179–81.

8. One noticeable absence is the lack of any mention of critical race theory, an issue I will address later in this Review.

9. And perhaps more impressively, it does so in a surprisingly well-written text for the world of law casebooks.

10. INTEGRATING SPACES, *supra* note 1, at xvii. The authors are not the first to make this query. Their questions echo earlier exhortations, such as those of Joseph William Singer. Joseph William Singer, *Re-reading Property*, 26 NEW ENG. L. REV. 711, 712 (1992) (“What would property law look like if we took gender issues as central, rather than peripheral, concerns? . . . Why not also ask about other differences that have been made to matter? What about race? Or class, disability, sexual orientation, religion?”).

11. I do not mean to imply that they mention only race. The authors readily acknowledge the influence and interconnection among property, race, and other systems of oppression. Their discussion includes seemingly nonracial topics in cases with no apparent minority parties. *See, e.g.*, INTEGRATING SPACES, *supra* note 1, at 219 (describing the impact of partition sales on African-American land ownership); *id.* at 231 (highlighting the issue of lead paint in residences, particularly among minority populations); *id.* at 257–61 (illuminating the connection between the imposition of fees for recreational facilities or social-club membership and racially restrictive covenants); *id.* at 261–68 (considering the range of relevant constituencies within a community whose interests must be considered by a charitable trust before taking actions that could adversely affect those constituencies).

presumption of legal neutrality and natural law is much harder to maintain in this light. The book is a story of the underbelly of property, the ugly picture of those dispossessed of legal rights, including the right to themselves.

Race-based property inequities in the United States remain deep and unrelenting.<sup>12</sup> People of color own less property and the property they own is less valuable.<sup>13</sup> The subprime-mortgage crisis has only worsened the divide.<sup>14</sup> As many theorists have pointed out, the law has sustained and even created racialized distributions of property.<sup>15</sup> In most law school classrooms, however, property disparities are taken as a given; the disproportionality becomes merely a backdrop to the “real legal issues.” If we do not examine the system that produced this imbalance, the inequity will remain an inexorable byproduct of the organic development of property law. Not mentioning race makes the current relationship between property and people of color appear inevitable.

Racial issues have long been delegated to specialized courses: Critical Race Theory, Race and Crime, Intersectionalities, Race and Gender, Civil Rights Law. Race is seen as a story pertaining to racial minorities, and the majority of law students—as well as the majority of lawyers, law professors, and lawsuit parties<sup>16</sup>—are still white.<sup>17</sup> Law school has always been a hostile place to the others, those distracting from “real law” with their stories and emotions—people of color, women, sexual minorities, the disabled, all those with their own tales to tell—anything that veers from the black-letter-law narrative. The focus of *Integrating Spaces* legitimizes these cases, placing

12. See Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 457–77 (2010) (tracing current wealth disparities back to the 1800s and documenting their increased severity).

13. See INTEGRATING SPACES, *supra* note 1, at 219 (relating that “today, black families own fewer than 19,000 farms nationwide” while the number of white-operated farms is around 2.4 million (quoting MICHAEL HELLER, GRIDLOCK ECONOMY 122 (2008))); Strand, *supra* note 12, at 462 (noting that white families own more equity in their homes than black families).

14. Miriam Jordan, *White-Minority Wealth Gulf Widens*, WALL ST. J., July 26, 2011, available at <http://online.wsj.com/article/SB10001424053111904772304576468333980952942.html>.

15. See, e.g., Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CALIF. L. REV. 1511, 1521–24 (1991) (arguing that American property law cannot be understood outside of its origins in racially charged doctrine); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1724–45 (1993) (tracing the history of whiteness as a property interest and describing the significant material advantages it has conferred on whites at the expense of other races); Strand, *supra* note 12, at 456 (discussing how our “centuries-old, race-based economic [and legal] system . . . separated White ‘haves’ and ‘could-haves’ from Black ‘have-nots’ and ‘could-never-haves’”).

16. See Judith G. Greenberg, *Erasing Race from Legal Education*, 28 MICH. J.L. REFORM 51, 73 (1994) (“[T]he majority of litigants are white . . .”).

17. See Okechukwu Oko, *Laboring in the Vineyards of Equality: Promoting Diversity in Legal Education Through Affirmative Action*, 23 S.U. L. REV. 189, 199–200 (1996) (“[B]lack lawyers represent only about 3.5% of the legal profession. . . . The legal training process is still dominated by whites: the teaching staff is still predominantly white; whites constitute the majority of law students in the country . . .” (internal quotation marks omitted)).

them squarely within the primary legal canon. On their own, some topics feel arcane, such as the material on burial plots<sup>18</sup> or on the *Tyrannosaurus rex* skeleton.<sup>19</sup> As a whole, the cases demonstrate the persistent influence of race in the most obscure corners of property law. The materials leave one glaring void in the discussion: the authors provide no development of critical race theory, a topic that requires more than supplying a compilation of property cases involving people of color.

## II. Why Property? Or, Why Do We Need Yet Another Casebook?

While many prepare incipient Property professors with the admonishment that everyone hates Property,<sup>20</sup> a more accurate description might be that nobody understands Property. Property is befuddling and consequently off-putting. While a tort or an assault feels like a concrete concern that students can analogize to real life (or at least to television), concepts like the rule against perpetuities and defeasible fees are bewildering at best.<sup>21</sup> Nonetheless, Property professors continue to assert that property lies at the center of our legal structure. At the most simplified (and perhaps overly simplistic) level, other areas of law derive from a relationship to property,<sup>22</sup> be it harms to or transfers of property rights, including the right to one's own body. Presumably, certain legal authorities agree on the essential nature of property law, as the subject continues to be a required course in over 85% of law schools<sup>23</sup> and present on the bar exams in all fifty states.<sup>24</sup>

---

18. INTEGRATING SPACES, *supra* note 1, at 113–18.

19. *Id.* at 189–93.

20. Craig J. Albert, *Property in Context*, 22 SEATTLE U. L. REV. 873, 888 (1999) (book review) (“Instructors of Property have to accept the fact that most students hate the subject.”). This daunting advice, however, is often joined with the adage that this leaves professors with nowhere to go but up; given such preconceptions, it takes little to surpass expectations and provoke new opinions on Property.

21. As Gregory S. Alexander explains, “Both contract and tort are organized around intuitively understandable conceptual constructs that connect the discrete topics within each course. Contract is ‘about’ bargains. Tort is ‘about’ injurious acts. The property course lacks any analogous construct that unites all the topics that are commonly covered . . . .” Gregory S. Alexander, *History as Ideology in the Basic Property Course*, 36 J. LEGAL EDUC. 381, 382 (1986).

22. Others, of course, have different views on the nature of law. See, e.g., Matthew E. Cavanaugh, *Contract + Tort = Property: The Trade Secret Illustration* (2011) (unpublished manuscript), available at [http://works.bepress.com/matthew\\_cavanaugh/1](http://works.bepress.com/matthew_cavanaugh/1) (arguing that property is comprised of tort and contract).

23. See CURRICULUM COMM. OF THE AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, A SURVEY OF LAW SCHOOL CURRICULA: 1992–2002, at 25 (2004) [hereinafter SURVEY OF LAW SCHOOL CURRICULA], available at [http://www.americanbar.org/content/dam/aba/migrated/legaled/publications/curriculumsurvey/Curriculum\\_Survey.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legaled/publications/curriculumsurvey/Curriculum_Survey.authcheckdam.pdf) (reporting that Property is a required course in 86.1% of full-time law school programs and 86.3% of part-time law school programs).

24. All states except Louisiana administer the real property portion of the multistate bar examination. *Id.* at 17 n.23. Louisiana includes questions about property on the state portion of its bar examination. See *Exam Subjects: Civil Code I*, LA. SUP. CT. COMMITTEE ON BAR ADMISSIONS,

The vital nature of property law may not be as obvious as Property professors contend. Along with other required introductory courses, semester hours have been decreasing.<sup>25</sup> Limited class time restricts the variety of topics that can be covered in any course. Nonetheless, Property fundamentals have remained the same; almost all professors adhere to the old standbys such as estates, adverse possession, and concurrent ownership.<sup>26</sup> In this climate, how can several hundred pages of additional text be more than a wistful list of cases to be covered “if only” one could return to the glory days of old?<sup>27</sup> A specialized casebook is only another distraction from the doctrinal core.

In my own class, I use Dukeminier’s *Property*,<sup>28</sup> as do many, if not most, of my colleagues. I have been happy with its development. Nonetheless, the casebooks—and, in turn, my students—are missing something. The study of property can only be enriched by appreciating other viewpoints. Even the most venerable of Property textbooks recognizes the need to update every now and again.<sup>29</sup> While always present, race has usually been ignored in our study of property. Most modern casebooks address racial issues explicitly, grazing upon the topic at some point in their thousand-plus pages. The coverage, however, remains lackadaisical at best. *Integrating Spaces* presents a needed solution. This book provides a way for both student and professor to unpack the meaning of race in the development of property law, and consequently in the legal system and society as a whole.

Greater knowledge of the role of race in property law helps create a comprehensive understanding of the current property distribution. Wealth

---

<http://www.lascba.org/civil1.asp> (listing “property law, including such matters as the kinds of property and accession, the personal servitudes of usufruct, use and habitation, predial servitudes, building restrictions and boundaries, and acquisitive prescription” among the topics covered).

25. Two-semester, six-credit courses have been reduced to one-semester, four- or five-credit courses. Joanne Martin, *The Nature of the Property Curriculum in ABA-Approved Schools and Its Place in Real Estate Practice*, 44 REAL PROP. TR. & EST. L.J. 385, 386 (2009). More than half of Property courses are now three or four credits. See *id.* at 390 tbl.1 (noting that among all ABA-approved law schools, 3.1% of Property courses are three credit hours and 48.7% of Property classes are four credit hours).

26. See *id.* at 388 (stating that after conducting a survey that drew responses from 186 law professors teaching at 120 law schools, Professors Peter Wendel and Robert Popovich “found that regardless of the course-credit-hour allocation, approximately 90% of the respondents included six topics in their courses—adverse possession, possessory estates and future interests, concurrent estates, landlord-tenant, easements, and covenants”).

27. Ideally, we might return to the nineteenth century, where two hours of Property were required for every semester of law school. See Albert, *supra* note 20, at 873 (discussing Harvard Law School in the time of John Chipman Gray and the first Property casebooks).

28. JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER & MICHAEL H. SCHILL, PROPERTY (7th ed. Aspen Publishers 2010) (1981) [hereinafter DUKEMINIER ET AL., PROPERTY 7TH ED.].

29. Dukeminier, for example, has produced seven editions in less than thirty years’ time. Compare JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY (1st ed. 1981), with DUKEMINIER ET AL., PROPERTY 7TH ED., *supra* note 28.

discrepancies based on race continue to perpetuate racial inequalities, as is especially clear in our current economy; while the recession has impacted everyone, the loss of assets has hit people of color hardest.<sup>30</sup> As with other topics in property law, while the cases in *Integrating Spaces* come from decades or even centuries ago, their relevance remains current: “Property is a thoroughly modern subject of thoroughly antiquated origins.”<sup>31</sup> Current property disparities originated in historic property disparities.<sup>32</sup> Today’s wealthiest African-American families trace back to the most moneyed families at the turn of the twentieth century.<sup>33</sup> Contrary to the Horatio Alger stories,<sup>34</sup> one’s familial class status has always been hard to break.

### III. Why Race? Or, Why Do We Need Yet Another Property Book?

In another notable property adage, Singer begins his casebook with the exhortation that “[p]roperty rights serve human values.”<sup>35</sup> Showing how property law has lived up to that aspiration (and has failed it) requires teaching how different factors have played into the creation of property law. In part, the failure of property enforcement to serve human values has come from inequalities built into our legal system. Based on race, the law defined whether one could or could not own property and whether one could or could not be property.

Property law is still not merely a study of inequality, and even if it were to be reduced to such, the potential origins for such discrimination are wide-ranging. Why focus so much on race, particularly at the inevitable disadvantage of other issues? One could hardly argue—and I am sure that the authors would not—that race is the only pertinent topic for a property law conversation.

Getting professors to add on new material, let alone assign a new casebook, is difficult at best. While lucky enough to teach a five-credit Property section, I still have constant dilemmas over what to cut. Five hours is never sufficient, and many of my colleagues settle for less. The book is initially presented as an adjunct to the introductory Property course.<sup>36</sup> One

---

30. See Jordan, *supra* note 14 (describing a report by the Pew Research Center indicating that “the recession from late 2007 to mid-2009 . . . took a ‘far greater toll’ on the wealth of minorities than whites”).

31. DUKEMINIER ET AL., PROPERTY 7TH ED., *supra* note 28, at xxxi.

32. Strand, *supra* note 12, at 457–68 (discussing historically rooted black–white wealth disparities in the United States and how laws of inheritance perpetuate this inequality).

33. Strand, *supra* note 12, at 475–77.

34. See *id.* at 483 (describing Horatio Alger stories as having protagonists who “begin life in poverty [and] achiev[e] success through effort and virtue”).

35. JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES, at xi (5th ed. 2010) (quoting Chief Justice Joseph Weintraub in *State v. Shack*, 277 A.2d 369, 372 (N.J. 1971)).

36. INTEGRATING SPACES, *supra* note 1, at xvii.

new case, however, inevitably means the deletion of an old one. Nonetheless, *Integrating Spaces* shows us why this substitution is well worth it.

#### A. *Beginning with Dispossession*

John Chipman Gray compiled the first Property textbooks in 1888, seventeen years after the creation of the legal casebook.<sup>37</sup> The original Property casebook came in at six volumes.<sup>38</sup> Dozens of shorter versions now abound.<sup>39</sup> After so many decades of Property casebooks, there would seem to be little space left on the market.<sup>40</sup> Like most things in property law, however, *Integrating Spaces* blends the old with the new. The text imbues classic cases with new perspectives and integrates fresh cases into established principles. Examining a few of the topics addressed illustrates not only what the authors demonstrate about race, but more importantly, what they demonstrate about property.

The authors begin with the familiar: Blackstone's infamous quote identifying property as "that sole and despotic dominion which one man exercises over the external things of the world, in total exclusion of any other individual in the universe."<sup>41</sup> Blackstone's words haunt many a casebook.<sup>42</sup>

37. John Chipman Gray is cited as the first Property casebook author, while Christopher Columbus Langdell takes credit for inventing the casebook form. Albert, *supra* note 20, at 873 (citing JOHN CHIPMAN GRAY, SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY (1888) and C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871)). Prior to Gray, several scholars had authored treatises on property that were used for legal study, Blackstone's being the most famous, of course. *E.g.*, 2 BLACKSTONE, *supra* note 2; HENRY ROSCOE, A TREATISE ON THE LAW OF ACTIONS RELATING TO REAL PROPERTY (London, Joseph Butterworth & Son 1825); JOSHUA WILLIAMS, PRINCIPLES OF THE LAW OF PERSONAL PROPERTY (London, S. Sweet 1848).

38. Albert, *supra* note 20, at 873 (citing GRAY, *supra* note 37).

39. Amazon provides a non-exhaustive collection of the multitudes of Property casebooks in current publication when one uses the search term "casebook" in the property law database. *Property Law Books*, AMAZON.COM, [http://www.amazon.com/s/ref=nb\\_sb\\_noss?url=node%3D10966&field-keywords=casebook&x=0&y=0](http://www.amazon.com/s/ref=nb_sb_noss?url=node%3D10966&field-keywords=casebook&x=0&y=0) (search "casebook").

40. Newcomers continue to show up on the scene, however, often to accolades. *E.g.*, PAUL GOLDSTEIN & BARTON H. THOMPSON, JR., PROPERTY LAW: OWNERSHIP, USE, AND CONSERVATION (2006); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES (2007); JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH (2009).

41. INTEGRATING SPACES, *supra* note 1, at 3 (quoting 2 BLACKSTONE, *supra* note 2, at \*2).

42. *See, e.g.*, JON W. BRUCE & JAMES W. ELY, JR., CASES AND MATERIALS ON MODERN PROPERTY LAW 15–16 (6th ed. 2007) (quoting Blackstone on the despotic nature of property rights); A. JAMES CASNER ET AL., CASES AND TEXT ON PROPERTY 3 (5th ed. 2004) (same); ALISON CLARKE & PAUL KOHLER, PROPERTY LAW: COMMENTARY AND MATERIALS 183 (2005) (same); DUKEMINIER ET AL., PROPERTY 7TH ED., *supra* note 28, at 92 (same); ROBERT C. ELLICKSON, CAROL M. ROSE & BRUCE A. ACKERMAN, PERSPECTIVES ON PROPERTY LAW 30 (3d ed. 2002) (same); J. GORDON HYLTON ET AL., PROPERTY LAW AND THE PUBLIC INTEREST: CASES AND MATERIALS 3 (3d ed. 2007) (same); SMITH ET AL., *supra* note 3, at 1 (same). The tradition harks

From there, however, the text diverges from the standard by including the rarely quoted part of Blackstone's Commentaries:

Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some element in our title; or at best we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built.<sup>43</sup>

The exploration that follows asks students to do exactly that: examine the origins of property and its development, even when it occurred in less-than-savory ways. The materials note that “[p]roperty rights are limited by and exist in conjunction with the rights of others,” again an oft-repeated sentiment.<sup>44</sup> The analysis takes a deeper look at how race enters into that conversation, calling on students to consider “the relationship between race and property law, and the impact of the law on all people, whether or not they own property.”<sup>45</sup>

While most casebooks attempt to explain first what property is and how people obtain it,<sup>46</sup> *Integrating Spaces* starts by taking it all away. The commentary begins with “dispossession” and then slavery,<sup>47</sup> topics casebooks rarely mention.<sup>48</sup> The issue of in what ways and in what pieces human

back to the beginning of the twentieth century. See, e.g., JOHN V. BRENNAN, *CASES ON THE LAW OF PERSONAL PROPERTY* 2–3 (1918) (quoting Blackstone).

43. INTEGRATING SPACES, *supra* note 1, at 4 (quoting 2 BLACKSTONE, *supra* note 2, at \*2). Reviewing Property casebooks from the past 122 years, I could not locate these words within any others.

44. *Id.*

45. *Id.*

46. See, e.g., DUKEMINIER ET AL., *PROPERTY* 7TH ED., *supra* note 28, at 3–96 (leading off with sections on acquisition and creation). This is hardly meant to be an empirical survey of Property casebooks, but rather merely some anecdotal remarks regarding familiar textbooks. Any examination of Property casebooks must inevitably start with Dukeminier, an overwhelming favorite reputed to have over 50% of the market share. I studied it as a first-year (albeit an earlier edition), and now I teach it to my students. Since so many choose Dukeminier, its contents are indicative of what the Property syllabus will include. I do not know a law professor who does not supplement her chosen casebook (unless she has written it, and often even then). Nonetheless, the casebook provides a starting point.

Previously, Singer began with original acquisition and *M'Intosh*, JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 3–14 (4th ed. 2006), but he then rearranged the materials for his 2010 edition, SINGER, *supra* note 35, at xxxviii–xxxix. Singer explains that his Property casebook traditionally began with original acquisition, thus answering the question, “How are property rights initially established?” *Id.* at xxxviii. Now, however, he looks to address the following questions initially: “What is property? What can be owned? What does it mean to own property?” *Id.* Consequently, the fifth edition of *Property Law* begins with trespass and rights to access. *Id.* at 3.

47. INTEGRATING SPACES, *supra* note 1, at 4–7.

48. Chused and Singer are notable exceptions. See RICHARD H. CHUSED, *CASES, MATERIALS AND PROBLEMS IN PROPERTY* 1375, 1391 (3d ed. 2010) (discussing Locke's labor theory of property and its continued influence on property law); SINGER, *supra* note 35, at 128 (citing Locke's belief that property is created through the application of one's labor to natural materials).

beings can be owned provides insight into the development of property.<sup>49</sup> The historic tale of slavery connects to property as part of one legal system. Here, the authors emphasize that, “our right of *possession* depended a great deal on others’ *dispossession*.”<sup>50</sup> By giving voice to those on the margins, the coverage imparts a story that is not normally told: that of those without property and those who *were* property. People most harshly affected by property laws can be those dispossessed of it, such as those who lose property by partition or tenants subject to eviction by their landlords.

As a contrasting example, the Dukeminier casebook begins with acquisition and creation.<sup>51</sup> Creation evokes the notion that one can bring property into being—property that then belongs to the deserving originator. This idea is directly traceable to John Locke’s labor theory of property,<sup>52</sup> again oft cited in Property casebooks.<sup>53</sup> Creation seems like a rational starting point: what better way is there to begin than with construction of things? Nonetheless, the focus on origin can create a misleading impression of property and furthers the comforting presumption that those in possession are rightfully so. Consequently, those without property must also be to blame for their lot.

After dispensing with Blackstone, *Integrating Spaces* officially opens with *The Antelope*.<sup>54</sup> The first chapter also includes *Johnson v. M’Intosh*,<sup>55</sup> another staple of Property casebooks and often found in the inaugural selection.<sup>56</sup> Instead of using *M’Intosh* as a starting point, as Dukeminier

49. Unfortunately, the coverage does not include current issues involving human trade, such as surrogacy or organ sales, despite the rich literature on the racial implications of these property markets.

50. INTEGRATING SPACES, *supra* note 1, at 4.

51. DUKEMINIER ET AL., PROPERTY 7TH ED., *supra* note 28, at 3–96.

52. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 17 (Thomas P. Peardon ed., 1952) (1690) (“Every man has a property in his own person [and the] labor of his body and the work of his hands . . . . Whatsoever then he removes out of the state that nature has provided and left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property.”).

53. *E.g.*, DUKEMINIER ET AL., 7TH ED., *supra* note 28, at 14–15; SINGER, *supra* note 35, at lii.

54. *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825), as reprinted in INTEGRATING SPACES, *supra* note 1, at 7. Out of all the casebooks, only Singer includes *The Antelope*. SINGER, *supra* note 35, at 260–61.

55. 21 U.S. (8 Wheat.) 543 (1823), as reprinted in INTEGRATING SPACES, *supra* note 1, at 16.

56. *See, e.g.*, CASNER ET AL., *supra* note 42, at 116–23 (excerpting *M’Intosh*); CHUSED, *supra* note 48, at 9–17 (same); JOHN E. CRIBBET ET AL., PROPERTY: CASES AND MATERIALS 85–90 (9th ed. 2008) (same); DUKEMINIER ET AL., PROPERTY 7TH ED., *supra* note 28, at 3–10 (same); GOLDSTEIN & THOMPSON, *supra* note 40, at 9–16 (same); SANDRA H. JOHNSON ET AL., PROPERTY LAW: CASES, MATERIALS AND PROBLEMS 22–30 (3d ed. 2006) (same); SHELDON F. KURTZ & HERBERT HOVENKAMP, CASES AND MATERIALS ON AMERICAN PROPERTY LAW 70–79 (5th ed. 2007) (same); MERRILL & SMITH, *supra* note 40, at 110–16 (same); SINGER, *supra* note 35, at 98–108 (same); SMITH ET AL., *supra* note 3, at 128–30 (same). *M’Intosh* appears to have been a classic since it was written. *See* JOSHUA WILLIAMS ET AL., PRINCIPLES OF THE LAW OF REAL PROPERTY 6

does,<sup>57</sup> the authors of *Integrating Spaces* place *M'Intosh* second.<sup>58</sup> The choice is a telling one. Dukeminier and others ask students to consider where property comes from and how to locate it. *Integrating Spaces* begins that inquiry within the human body, asking not just whose property is in question, but who is property.

Decided two years after *M'Intosh* and seventeen years before *The Amistad*,<sup>59</sup> *The Antelope*—another Marshall opinion—tells of another slave ship. With a group of pirates at the helm, *The Antelope* captured cargo from three different slave ships that hailed from three different countries; the vessels originally sailed under the flags of the United States, Spain, and Portugal.<sup>60</sup> Off the coast of Florida, however, an American revenue cutter overtook the ship and brought the captured African slaves to Savannah, Georgia.<sup>61</sup> Spain and Portugal petitioned for return of the Africans, “who ha[d], in the regular course of legitimate commerce, been acquired as property by the subjects of their respective sovereigns.”<sup>62</sup> Marshall recognized that the case involved “claims in which the sacred rights of liberty and of property come in conflict with each other.”<sup>63</sup> Despite his qualms over human bondage, property prevailed: as he did in *M'Intosh*,<sup>64</sup> Marshall atoned that the principles he was about to support were “contrary to the law of nature.”<sup>65</sup> The Court was bound to uphold common international trade law, which held that “the legality of the capture of a vessel engaged in the slave trade[] depends on the law of the country to which the vessel belongs.”<sup>66</sup> Consequently, the Africans originating from the American boat were given their freedom, while the previous owners could lay claim to those from the Spanish and Portuguese boats.<sup>67</sup>

---

n.1 (Philadelphia, T. & J.W. Johnson & Co. 1886) (referring to “the well-known case[] of *Johnson v. M'Intosh*”).

57. DUKEMINIER ET AL., PROPERTY 7TH ED., *supra* note 28, at 3.

58. INTEGRATING SPACES, *supra* note 1, at 16.

59. United States v. Libellants of Schooner *Amistad*, 40 U.S. (15 Pet.) 518 (1841).

60. INTEGRATING SPACES, *supra* note 1, at 6.

61. *Id.*

62. *The Antelope*, 23 U.S. (10 Wheat.) 66, 114 (1825), as reprinted in INTEGRATING SPACES, *supra* note 1, at 7.

63. *Id.*

64. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 591–92 (1823), as reprinted in INTEGRATING SPACES, *supra* note 1, at 21.

65. *The Antelope*, 23 U.S. (10 Wheat.) at 120, as reprinted in INTEGRATING SPACES, *supra* note 1, at 7.

66. *Id.* at 118, as reprinted in INTEGRATING SPACES, *supra* note 1, at 9.

67. See INTEGRATING SPACES, *supra* note 1, at 12. The actual disposition of this human property was left to the circuit justice. *Id.* The Spanish ultimately provided records of ownership for about thirty-nine of the Africans. *Id.*

A discussion of *Mima Queen & Child v. Hepburn*<sup>68</sup> rounds out *The Antelope* section.<sup>69</sup> In *Mima Queen*, the laws of hearsay prevented the petitioners from presenting the only evidence they had as to their free status. A seemingly race-neutral evidentiary rule had great consequences, with the burden falling on those parties who may have had difficulty securing written records, regardless of the pressing necessity of their claims.<sup>70</sup> Marshall again used the stolid tones of property to defend the status quo, asserting that for any property right to be taken seriously, all property rights must be defended with the same scrutiny.<sup>71</sup> Justice Gabriel Duvall argued for a hearsay exemption based on the balancing of interests, asserting that “[i]t will be universally admitted that the right to freedom is more important than the right of property.”<sup>72</sup> A majority of the standing Supreme Court disagreed. A more apt characterization was that of Charles Edward Stowe: “An attack on any form of property is an assault on the whole basis of civilized society, and seen as revolutionary and dangerous in the highest degree.”<sup>73</sup>

The cases provoke two central questions: Is the right to freedom more important than the right to property? What does it mean to pose the two as antipodes? The materials on slavery press students to consider the origins and consequences of property principles. In other contexts, such cases are presented as historical anomalies in the joint evolution towards liberty and private property.

Property and liberty have often been in conflict, even while one can be seen as necessary for the other. When classes of people have different fundamental rights to property regarding the ability to own or be owned, the property structure is warped. In one example, concerns about manumitted slaves and their potential property holdings moved the court to limit the rights of property transfer for the good of the public.<sup>74</sup> Defense of slavery through defense of property rights should create wariness toward anyone who stresses the supremacy of property rights over all else. Case law repeatedly demonstrates that property rights are never absolute and are often used to preserve public norms—in slavery’s case, racialized norms.

68. *Mima Queen & Child v. Hepburn*, 11 U.S. (7 Cranch) 290 (1813).

69. INTEGRATING SPACES, *supra* note 1, at 12–13.

70. *See id.* (citing *Hepburn*, 11 U.S. (7 Cranch) 290). *The Amistad* addressed a similar evidentiary issue—the determination of whether the Africans aboard the ship were originally slave or free turned on a question of property and the applicable burden of proof. *Id.* at 14–15 (quoting Brant T. Lee, *Teaching The Amistad*, 46 ST. LOUIS U. L.J. 775 (2002)).

71. *See id.* at 13 (“[I]f [the] circumstance that the eye witnesses of any fact be dead should justify the introduction of testimony to establish that fact from hearsay, no man could feel safe in any property . . . .” (quoting *Hepburn*, 11 U.S. (7 Cranch) at 296)).

72. *See id.* (quoting *Hepburn*, 11 U.S. (7 Cranch) at 298–99 (Duvall, J., dissenting)).

73. *Id.* at 14 (quoting Charles Edward Stowe, *The Religion of Slavery*, 5 THE CRISIS 36, 36 (1912)).

74. *Hinds v. Brazealle*, 3 Miss. (2 Howard) 837, 841–44 (1838), *as reprinted in* INTEGRATING SPACES, *supra* note 1, at 42–44.

### B. Contemporary Property

In the book's third part, the conversation turns toward the contemporary.<sup>75</sup> The chapter starts by announcing that it will explore "the responsibilities of a society" to assist those in its midst and alleviate social inequality.<sup>76</sup> Property law casebooks rarely discuss group obligations. Generally, American law addresses the rights of the individual against the state or one's neighbors. Few social responsibilities adhere to private rights. Consequently, introducing a study of American property with a discussion of obligation seems an odd choice, albeit clearly a conscious one. By uncovering the usually invisible racial and other social implications, the authors question the perception that property law is distinct from social development. If property law already has significant cultural and social impact, it should also create corresponding responsibilities. If the constructions of the legal property regime assisted the systematic disenfranchisement of certain groups, it should rightly address them.

The section titled "Race and Contemporary Property" is replete with examples of seemingly impartial laws with profound racial consequences, such as adverse possession,<sup>77</sup> lead-paint infestation,<sup>78</sup> and easements.<sup>79</sup> The average Property text skims by these topics without examining the populations who may be disproportionately harmed. In the case of concurrent ownership, a ubiquitous if increasingly disfavored form of title, one tenant can bring a partition action to request a division in kind or by sale of the property.<sup>80</sup> Without such an action, a joint owner could be held hostage in land he no longer used, forced either to accede to his co-owner or otherwise walk away from his property rights; either option could produce inequity. In recent history, however, partition claims have resulted in waves of land disenfranchisement for black farmers.<sup>81</sup> The poor and people of color are more likely to die without an executed will.<sup>82</sup> At death, property passed down through state intestacy statutes creates fractured tenancies-in-common with heirs strewn about the country.<sup>83</sup> With each generation, the heirs grow

---

75. INTEGRATING SPACES, *supra* note 1, at 121. The cases do not make it past the 1960s until more than a third of the way through the book. *Id.* at 131.

76. *Id.* at 121.

77. *Id.* at 200–09.

78. *Id.* at 226–31.

79. *Id.* at 231–56.

80. *Id.* at 214–15.

81. Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 507 (2001), as reprinted in INTEGRATING SPACES, *supra* note 1, at 219.

82. Strand, *supra* note 12, at 492.

83. Mitchell, *supra* note 81, at 507–08, as reprinted in INTEGRATING SPACES, *supra* note 1, at 220.

more numerous and the bonds more attenuated. As a result, “[o]pportunistic lawyers and land speculators” are able to buy up small fractions of a tenancy, use a partition action to force sale, and then purchase the whole of the property at a reduced price.<sup>84</sup> These “race-neutral” laws have profoundly raced consequences. In the Southeast, “heir property” (property acquired through intestacy) used to constitute over 40% of black-owned land.<sup>85</sup>

In contrast, the race-nuisance cases present an intriguing set of social dilemmas.<sup>86</sup> The discussion of nuisance furnishes vivid examples of how the value of property—even real property that we consider so stable—is infinitely cultural.<sup>87</sup> Nuisance itself examines what the law will consider overly detrimental to one’s neighbors, a cultural determination to the extent that it considers socially accepted existing and preexisting uses. Nuisance law resolves what people should have to tolerate, be it pig farms, loud air conditioners, or cement factories. In conjunction, the court considers what losses in values can and should be compensated. Other topics in Property class, such as regulatory takings, explore how expectations of property and its use may change value (and the extent to which government will be held responsible).<sup>88</sup>

In race-nuisance doctrine, the race of one’s neighbors impairs land value. Property owners correctly ascertained that the presence of African-American neighbors brought down the value of their homes, though they themselves were responsible for the self-perpetuating cycle of dropping prices.<sup>89</sup> Afraid of harm to their homes (and to themselves) caused by nonwhite neighbors, property owners rushed to sell, even at lower prices than the previously calculated worth. The perception of lost value buttressed the rush of sales, which then drove costs even lower: the perception of plummeting prices was sufficient for prices to plummet. The social construction of property directly affected real market value. Perception of human worth affects property worth, whether valuing a painting or a neighborhood. The difference lies in when the court will allow you to recover.

---

84. *Id.* at 508, as reprinted in INTEGRATING SPACES, *supra* note 1, at 220.

85. *Id.* at 518, as reprinted in INTEGRATING SPACES, *supra* note 1, at 221.

86. *Id.* at 64–76.

87. *Trueheart v. Parker*, 257 S.W. 640, 641–42 (Tex. Civ. App.—San Antonio 1923, no writ) (enjoining the operation of a jazz club because of the “screeching pianos, high-keyed violins and blaring saxophones emitting the strains of barbaric jazz, more discordant than tom-tom or Chinese gong”), as reprinted in INTEGRATING SPACES, *supra* note 1, at 66.

88. *E.g.*, JOHN E. CRIBBET ET AL., *supra* note 56, at 811–49.

89. *See Buchanan v. Warley*, 245 U.S. 60, 73–74 (1917), as reprinted in INTEGRATING SPACES, *supra* note 1, at 82 (explaining that a zoning ordinance prohibiting white and nonwhite households from living on the same block was meant to “prevent[] the deterioration of property owned and occupied by white people . . . [that] is sure to follow the occupancy of adjacent premises by persons of color”).

*M&T Mortgage Corp. v. Foy*<sup>90</sup> rounds out the discussion—the last case chronologically, albeit located in the middle of the book.<sup>91</sup> *M&T Mortgage* begins with a declaration that “[e]quity abhors discrimination.”<sup>92</sup> The opinion addresses the subprime-mortgage crisis, another example of seemingly race-neutral forces with dire race-based consequences. Mainstream media has widely discussed the race-based impact of the subprime-mortgage crisis,<sup>93</sup> but the attention given in law school classrooms has been varied. The most recently updated casebooks include sections on the mortgage crisis. Singer, for example, reorganized the entirety of his casebook in response.<sup>94</sup> In contrast, Dukeminier merely mentions that predatory lending practices are “often targeted at elderly and minority persons.”<sup>95</sup> Students sitting down with Dukeminier’s newest edition<sup>96</sup> could easily cover the materials on the subprime-mortgage crisis without grasping the disparate racial outcomes. A lack of awareness about the influence of racial factors and persistent discrimination makes the outcomes appear as unfortunate, perhaps, but inevitable.

### C. *The International Perspective*

*Integrating Spaces* closes with international issues in property.<sup>97</sup> Such an examination is not unique, but it is nonetheless exceptional when compared to other casebooks. The core curriculum usually disfavors international law, although that has changed with the increasing globalization of law and markets.<sup>98</sup> As in other topics, however, the typical Property casebook has not caught up to the trend. Property law looks to state and local entities, not to other countries. Yet again, *Integrating Spaces* fills the absence.

The use of comparison itself enlightens as the customary and essential flips on its head. A global perspective has value in its own right, but for our purposes, the importance lies in the impact upon the conventional property narrative. As the commentary points out, international perspectives demonstrate the many potential solutions to a previously inert property

---

90. *M&T Mortg. Corp. v. Foy*, 858 N.Y.S.2d 567 (N.Y. Sup. Ct. 2008).

91. *Id.*, as reprinted in *INTEGRATING SPACES*, *supra* note 1, at 179–81.

92. *Id.* at 568, as reprinted in *INTEGRATING SPACES*, *supra* note 1, at 179.

93. *E.g.*, Manny Fernandez, *Racial Disparity Found Among New Yorkers with High-Rate Mortgages*, N.Y. TIMES, Oct. 15, 2007, at B1.

94. SINGER, *supra* note 35, at xxxviii. He includes *M&T Mortgage* as well. *Id.* at 907–10.

95. DUKEMINIER ET AL., *PROPERTY 7TH ED.*, *supra* note 28, at 628.

96. Including my own, I admit.

97. *INTEGRATING SPACES*, *supra* note 1, at 269–321.

98. Many law schools have increased their international law course offerings in recent years. See *SURVEY OF LAW SCHOOL CURRICULA*, *supra* note 23, at 33 (reporting that 74 of the 152 schools that participated in the survey had increased their international law course offerings in recent years).

dilemma.<sup>99</sup> The international perspective brings clarity to the mutability of law and value, and it erodes the notion of the one inherent and universal truth.

A case from Guatemala<sup>100</sup> pushes students to think literally outside the prescribed lines of the American property law canon. Reading *Bulun Bulun v R & T Textiles*<sup>101</sup> or *Minister of Land Affairs v Slamdien*<sup>102</sup> challenges students to apply familiar principles in unexpected places and to consider exotic precepts in domestic locations. One can still attempt distance. The United States does not have an apartheid system, so the situation of South Africa can be construed as irrelevant. Nonetheless, systematic property dispossession has occurred repeatedly in this nation's history: from slavery and the Alien Land Laws to redlining and racial covenants. Similarly, the casebook highlights "troubling wealth inequities [that] exist over the use and ownership of land . . . often exacerbated by existing racial, ethnic, and social tensions" in the international forum.<sup>103</sup> The text does not mention correspondingly large inequities in the United States. These international cases, however, do allow the start of a discussion that may not occur otherwise.

#### IV. Examining Absence

*Integrating Spaces* is only the beginning of a conversation. Brophy, Lopez, and Murray have begun the Herculean task of taking all of race and property and stuffing it into the confines of a paperback book. In their project, itself a study of absence, lies its own void. As the introduction states, the compilation incorporates property cases involving race and those involving racial minorities. Most glaring is the dearth of any discussion of critical race theory. A true study of race and property should include these complications.

On one hand, the text already projects a critical-race understanding of the law. *Integrating Spaces* could not have been written without the influence of these ideas. Critical race theory teaches that "race is always already inscribed in the most innocent and neutral-seeming concepts."<sup>104</sup> The case selection drills in this message. Nonetheless, critical race theory involves

99. INTEGRATING SPACES, *supra* note 1, at 269.

100. Friendly Settlement Agreement, Community of San Vicente Los Cimientos v. Guatemala, Case No. 11.197, Inter-Am. Comm'n H.R., Report No. 68/03, OEA/Ser.L/V/II.118, doc. 70 rev. 2 ¶ 36 (2003), as reprinted in INTEGRATING SPACES, *supra* note 1, at 318–20.

101. (1998) 86 FCR 244 (Austl.), as reprinted in INTEGRATING SPACES, *supra* note 1, at 272–80.

102. 1999 (4) BCLR 1 (LCC) at 413 (S. Afr.), as reprinted in INTEGRATING SPACES, *supra* note 1, at 286–94.

103. INTEGRATING SPACES, *supra* note 1, at 281.

104. Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 743 (1994).

more than acknowledgement of how neutral policies have disproportionate impacts on minority groups. A complete picture considers how the invasive nature of racism has affected the development of the law itself. Critical race theory asks what the canon tells us about how we interpret property and how race is already present in shaping that story.

Critical race theory also looks forward. In Cornel West's words, it "is a gasp of emancipatory hope that law can serve liberation rather than domination."<sup>105</sup> Critical-race-theory principles cast a penetrating light upon accepted legal canons in search not only of truth but of action against oppression.<sup>106</sup> Such goals may be beyond the ambit of a casebook. Perhaps the chosen technique of illumination used here enables the materials to reach a greater audience of Property professors and students who might otherwise be alienated by complicated theory and overbearing aspirations. Nonetheless, no matter how well edited, every casebook inevitably incorporates disliked portions or seemingly superfluous theory. The authors explicitly acknowledge their own overbroad selection, noting that they "included many more cases than you will likely study in any course" to accommodate diverse users.<sup>107</sup>

There is one absence I cannot explain away: the omission of Cheryl Harris's *Whiteness as Property*.<sup>108</sup> The first casebook on Race and Property has no mention of this momentous piece, which has framed the debate on race and property ever since its publication. Harris's work reveals how whiteness has tangible property implications, created from legal text and legal action.<sup>109</sup> According to *Black's Law Dictionary*, *property* is "[t]he right to possess, use, and enjoy a determinate thing,"<sup>110</sup> or in the "widest sense . . . includes all a person's legal rights."<sup>111</sup> Whiteness has determined legal entitlements by delineating what rights one could obtain in property, such as limiting property claims to possession and not ownership in *Johnson v. M'Intosh*<sup>112</sup> or restricting leases under the Alien Land Laws.<sup>113</sup> During

105. Cornel West, *Foreword* to *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, at xi, xii (Kimberlé Crenshaw et al. eds., 1995).

106. See, e.g., Stephanie L. Phillips, *The Convergence of the Critical Race Theory Workshop with LatCrit Theory: A History*, 53 U. MIAMI L. REV. 1247, 1249–50 (1999) ("Critical Race Theory . . . works toward the liberation of people of color as it embraces the larger project of liberating all oppressed people.").

107. *INTEGRATING SPACES*, *supra* note 1, at xvii.

108. Harris, *supra* note 15 (exploring the property functions of whiteness).

109. *Id.* at 1731–37.

110. *BLACK'S LAW DICTIONARY* 1335 (9th ed. 2009).

111. *Id.* at 36 (quoting JOHN SALMOND, *JURISPRUDENCE* 423–24 (Glanville L. Williams ed., 10th ed. 1947)).

112. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 591 (1823), as reprinted in *INTEGRATING SPACES*, *supra* note 1, at 21 ("[T]he Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others.").

periods of slavery and state segregation, racial boundaries and legal rights were manipulated as the political economy required, such as through the installation of rigid Jim Crow regulations.

The notion of whiteness as property was first advanced in court by Albion Tourgee, counsel for Homer Plessy in *Plessy v. Ferguson*.<sup>114</sup> Tourgee argued that when Plessy was ousted from a whites-only railway car, even though he outwardly appeared white, Plessy lost valuable reputational rights.<sup>115</sup> Tourgee explained that “the reputation of belonging to the dominant race . . . is *property*, in the same sense that a right of action or of inheritance is *property*.”<sup>116</sup> In advancing his argument, Tourgee contended that “[p]robably most white persons if given a choice, would prefer death to life in the United States *as colored persons*.”<sup>117</sup> Consequently, he asserted, “Under these conditions, is it possible to conclude that the *reputation of being white* is not property? Indeed, is it not the most valuable sort of property, being the master-key that unlocks the golden door of opportunity?”<sup>118</sup> State courts had previously appeared to embrace this idea, emphasizing the tangible privileges that adhered to whiteness, both as flowing from whiteness and as proof of whiteness.<sup>119</sup> In reiterating these concepts, Tourgee attempted to destabilize the property interest in whiteness, but failed quite miserably.

The analysis of whiteness as property implicates the nature of white privilege, which Harris articulates as a concrete entity that one can “use and enjoy[.]”<sup>120</sup> Whiteness has a corporeal presence to the extent that it materially affects daily life. Under this lens, whiteness ceases to be an immutable biological trait but instead becomes a social construction that provides power and can be used to further oppression. This understanding of race requires acknowledgment that “recognizing oneself as ‘white’ necessarily assumes premises based on white supremacy” and that white skin implicitly deploys white privilege and racial subjugation.<sup>121</sup>

---

113. The various Alien Land Laws denied the right to purchase real property to persons unable to obtain citizenship in the United States, which in practice meant the Japanese and other Asian groups. INTEGRATING SPACES, *supra* note 1, at 89–98.

114. 163 U.S. 537, 549 (1896).

115. Brief of Plaintiff in Error at 8, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (No. 210).

116. *Id.*

117. *Id.* at 9.

118. *Id.*

119. *Cf.* *Gaines v. Ann*, 17 Tex. 211, 214 (1856) (“Lawful slavery is confined to the African race.”).

120. Harris, *supra* note 15, at 1734.

121. *Id.* at 1737.

Struggles over the status of persons of African descent have been a central feature in the American saga since its inception. Recognition as a white person has been, and continues to be, a highly significant and contested category. These concepts provide more than historical background. Notwithstanding the existence of civil rights legislation and significant changes in social practice, racial categorization as a white person remains a valued state.<sup>122</sup> *Integrating Spaces*, however, does not discuss the concept of whiteness at all.

## V. Conclusion

*Integrating Spaces* weaves together invisible tears in the fabric of the property canon. The exciting part is that the authors have constructed their work so as to take everyone with them. Scholars can broaden their understanding of property law simply by browsing the text. I know of few professors who could read these materials without making some change to their Property course, even if only to add on a few cases. One cannot absorb this book without becoming aware of its import. Brophy, Lopez, and Murray have provided us with an excellent resource, as well as some captivating reading.

Something as solid and seemingly static as property law can appear to hold a certain inherent truth and inevitability along with an air of neutrality. Property law has the heft of centuries: potentially archaic, but definitely weighty. Nonetheless, conceptions of legal rights are affected by the geography of time, space, and population. They have changed with the time and culture, continue to change, and should change. *Integrating Spaces* demonstrates this by taking one slice of the smorgasbord and teasing out all its implications. For any lover of Property, it is a delight. The authors seem to be reaching at times,<sup>123</sup> but the book as a whole ties together well. While I would have my own additions were I to design a Race and Property course, the book makes such a course infinitely accessible: any professor could easily pick up these materials and begin the semester.

---

122. In experiments presented by Andrew Hacker, the white students involved, if not preferring death per se, would require at least \$50 million to live out life as a black person in the United States. ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 32 (1992).

123. See, e.g., *INTEGRATING SPACES*, *supra* note 1, at 262–68 (excerpting *In re Milton Hershey School Trust*, 807 A.2d 324 (Pa. Commw. Ct. 2002), but failing to make any racial connection in the case, which otherwise appears to add little to the work as a whole).

Ultimately, however, I wish this book did not exist. In an ideal world, we would not need *Integrating Spaces*. The cases and ideas would already be an integral part of the Property textbook and the first-year Property course. Only when incorporated as such will these texts truly be considered part of property doctrine as opposed to distractions from it.<sup>124</sup>

---

124. Students often look askance at supplemental reading not assigned in the casebook, which students tend to regard as far more authoritative. See, e.g., Reginald Leamon Robinson, *Teaching from the Margins: Race as a Pedagogical Sub-text: A Critical Essay*, 19 W. NEW ENG. L. REV. 151, 171 (1997) (asserting that supplementing a class with a professor's materials "invariably raises charges from students that professors are not meeting the students' narrow pedagogical needs"); Keith Sealing, *Dear Landlord: Please Don't Put a Price on My Soul: Teaching Property Law Students that "Property Rights Serve Human Values,"* 5 N.Y. CITY L. REV. 35, 36 (2002) (describing his approach of teaching Property using a text with minimal supplementation and acknowledging that "the casebook adds a sense of legitimacy to the materials that a homemade supplement might lack").